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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DERRICK MILLER, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do the principles of constructive jeopardy and the language of Title 18 U.S.C. §924(c) prevent a conviction for carrying a firearm in relation to a drug trafficking crime when it was not charged in the original complaint and when the underlying drug trafficking offense has been reversed and dismissed on appeal for a Speedy Trial Act violation based on the original complaint.

2. Does the Sixth Amendment right to a speedy trial or the Speedy Trial Act demand dismissal with prejudice of the charge of carrying a firearm in relation to a drug trafficking crime on reindictment when the initial complaint for the underlying drug trafficking crime should have been dismissed with prejudice for a violation of the Speedy Trial Act a year earlier.

3. Should a defendant be granted a new trial on the charge of carrying a firearm in relation to a drug trafficking crime when his conviction for the underlying drug trafficking crime has been reversed and dismissed with prejudice on appeal for a

Speedy Trial Act violation because he is denied his rights to due process and a fair trial under the Fifth Amendment and to prepare his defense based upon accurate information about the charges against him under the Sixth Amendment.

4. Does the "inventory search" exception to the Fourth Amendment warrant requirement apply to the search of a vehicle which was not identified as belonging to the defendant and which was not identified as being subject to forfeiture, when no other exigent circumstances existed for a warrantless search.

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Derrick Miller, Petitioner

vs.

United States of America, Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

Petitioner, Derrick Miller, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit which refused to vacate his conviction for carrying a firearm in relation to a drug trafficking crime when it dismissed with prejudice the underlying conviction for conspiracy to possess with intent to distribute illegal drugs for a violation of the Speedy Trial Act; and which refused to suppress from evidence the gun seized

from a warrantless "inventory search" of a vehicle not identified as his and not subject to forfeiture when no other exigent circumstances existed.

OPINION BELOW

The opinion of the Court of Appeals is not yet published, but will be reported as United States v. Derrick Miller, 23 F.3d 194, (8th Cir. 1994), and appears in Appendix A to this Petition. The Order of the Court of Appeals denying Petitioner's timely filed Petition for Rehearing is not reported, but a copy of the Order is attached as Appendix E. The unpublished Order and Recommendation of the Magistrate Judge and Memorandum thereto are attached as Appendices B and C respectively. The also unpublished Order of the District Court Judge adopting the rulings of the Magistrate appears in Appendix D.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals in this matter was filed on April 7, 1994. A timely Petition for Rehearing was filed on April 21, 1994. The Court of Appeals' denial of the Petition for Rehearing was issued April 29, 1994. This Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part:

> No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . .

The relevant portion of the Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation . . .

The relevant sections of the Speedy Trial Act are attached hereto in Appendices F and G. The pertinent part of Title 18 U.S.C. §924 is set forth on page 20 of this Petition.

STATEMENT OF THE CASE

The United States District Court, Eastern District of Missouri, Eastern Division had original jurisdiction of this case pursuant to Title 18 U.S.C. §3231 as Petitioner was charged with offenses against the laws of the United States.

On October 14, 1991, Petitioner Derrick Miller (hereinafter "Miller") was arrested along with Calvin Wallace (hereinafter "Wallace") in a "reverse operation". The Drug Enforcement

Administration (hereinafter "D.E.A.") and the Missouri State Highway Patrol (hereafter "M.S.H.P.") with the help of the Louisiana State Police sold cocaine and marijuana to Miller through the use of a confidential informant, Moris Chalah, and a M.S.H.P. undercover agent, Kevin Glaser.

On October 14, 1991, Miller appeared before the Honorable Catherine D. Perry, United States Magistrate, on Criminal Complaint Case No. 91-6187M, which charged him and Wallace with conspiracy to possess with intent to distribute marijuana and cocaine in violation of Title 21 U.S.C. §846. On October 21, 1991, a preliminary hearing was held at which Judge Perry found probably cause to hold Miller for further proceedings. On January 10, 1992, Judge Perry dismissed the Complaint based upon a letter to her from Assistant United States Attorney Edward J. Rogers. The letter simply stated the Complaint was being dismissed because the Government "had decided not to proceed with criminal prosecution at this time." The Order did not state whether the dismissal was with or without prejudice.

On October 1, 1992, nearly one year later, a two count Indictment was issued against Miller.

The suppressed Indictment recharged Miller and Wallace with conspiracy to possess with the intent to distribute cocaine and marijuana in Count I. In Count II, a new charge was filed against Miller -- carrying a firearm in relation to the drug trafficking crime charged in Count I. On December 3, 1992, Miller was arrested on the Indictment, and the next day the United State's Attorney's Office lifted the suppression on the Indictment.

Miller filed various pretrial motions, including a Motion to Suppress Statements, a Motion to Suppress Tangible Evidence, and a Motion to Dismiss the Indictment for Failure to Comply with the Speedy Trial Act. After a hearing on January 8, 1993, Magistrate Judge Buckles denied all of Miller's aforementioned Motions. On February 16, 1992, after reviewing Miller's Objections to the Order and Recommendation of the Magistrate, the Court adopted it and denied his previously filed Motion to Dismiss the Indictment for Failure to Comply with the Speedy Trial Act, to Suppress Tangible Evidence, and to Suppress Statements.

On February 17, 1993, a four day jury trial commenced. At that time, the Court denied Appellant's Motion to Quash the Indictment based on

entrapment and outrageous government conduct which had been filed that same day. The Government's first witness was Sergeant George Johnston (hereinafter "Johnston") of the Louisiana State Police. Johnston testified that Chalah had been arrested in Monroe, Louisiana, after a traffic stop revealed approximately 25 pounds of marijuana in the trunk of his car. Johnston stated that Chalah agreed to cooperate with the authorities in their investigation of the source and destination of the marijuana. Johnston admitted that in exchange for Chalah's cooperation, he would not be prosecuted for possession of the marijuana. Johnston explained how Chalah contacted Miller through a mobile phone number in St. Louis and that they recorded each of three telephone conversations.

Johnston conceded that once Chalah had been arrested there was no chance of the twenty-five pounds of marijuana being transported to Missouri. He also admitted that Chalah had no cocaine in his possession. Johnston agreed that had they simply prosecuted Chalah in Louisiana, no drug transactions would have taken place in St. Louis with Miller and there would have been no conspiracy or gun charges against him. Johnston admitted the

Louisiana State Police made approximately $45,000.00 from the use of Chalah to arrest Miller.

Johnston said they were unable to locate Chalah's supplier in El Paso, Texas, but on cross-examination he was unable to remember any details about that part of the investigation. Johnston admitted Chalah had told them he could get a 300 pound load from his supplier. However, Johnston never had Chalah go to El Paso, Texas, in an attempt to capture his supplier. He admitted that the marijuana they seized from Chalah never left Louisiana. Johnston claimed they raised the issue of selling cocaine to Miller with Chalah as a routine part of questioning.

The Government's second witness was Sergeant Richard Moynihan from M.S.H.P., who coordinated the investigation in Missouri. He explained how he procured four and a half kilograms of cocaine and twenty-five pounds of marijuana to use in the reverse operation from the M.S.H.P. Moynihan said that control of the cocaine had been given to the M.S.H.P. by the federal court for use in criminal investigations. He stated the drugs were taken to the Drury Inn in north St. Louis County near the airport, where the transaction was to take place.

After the transaction, Moynihan said he returned the drugs to the M.S.H.P.

Moynihan admitted that the M.S.H.P. received part of the money recovered from the reverse operation. He conceded there was no chance that the cocaine and marijuana used in the deal would ever be out on the streets of St. Louis, much less the hotel parking lot. Moynihan admitted the crime in Missouri was created there with the cocaine and marijuana already seized from earlier drug busts. Moynihan testified he did not know what kind of deal Chalah had cut in Louisiana for his cooperation. He admitted that Chalah never said he had dealt with cocaine in the past. Moynihan confessed there would have been no cocaine or marijuana deal at the Drury Inn without the drugs taken from the M.S.H.P. evidence locker.

The Government's first witness on February 18, 1993, was the confidential informant, Moris Chalah (hereinafter "Chalah"). Chalah admitted to having two prior felony convictions. He testified to being stopped in Monroe, Louisiana, with marijuana in his trunk. Chalah explained how he cooperated with the police by making three telephone calls to "Derrick", and allowing them to

be recorded. Over Miller's objection to an inadequate foundation for the admission of the tape, all three conversations were played.

Chalah agreed that he was the one who first mentioned cocaine to Miller in their first phone call. In fact, a review of the three conversations indicated that Chalah was pushing Miller into the cocaine deal. At one point, Miller tried to cancel the deal, so Chalah changed the terms of the deal to keep Miller interested in the cocaine.

Chalah testified that he then went to St. Louis with the Louisiana officers to the Drury Inn where the D.E.A. and M.S.H.P. had set up videotape surveillance of Chalah's motel room. Chalah explained how the events happened up at the motel. He said Miller showed up and that he called undercover agent Glaser to bring in drug samples from another motel room. He said Miller then took samples of the cocaine and marijuana and left.

Chalah said when Miller returned, Wallace was with him. He stated they brought a suitcase containing money. Chalah testified Glaser then retrieved from another room the rest of the drugs the M.S.H.P. had available at the motel, which was four and a half kilos of cocaine and twenty-five

pounds of marijuana. He said Miller and Wallace inspected the drugs with a knife provided by Glaser. He explained how Miller and Wallace were told they could only have four and a half kilos of cocaine at that time, so Miller and Wallace were to keep part of the money they had brought. Chalah testified Wallace left the room at that point to pull up the car. He said that as Miller got ready to leave, he was arrested.

When Chalah was cross-examined about what the Louisiana police asked about his supplier, he could not recall. Chalah admitted that he never took them to find his supplier. Contrary to Johnston's testimony, Chalah denied that the Louisiana officers ever questioned him about cocaine. He acknowledged that he never had any cocaine to sell, and never transported any.

Chalah could not remember when the police first told him they could supply him with cocaine to make a deal with Miller. Chalah tried to deny pushing the cocaine sale on Miller. He admitted the police were in control of him when he made the calls and the St. Louis deal. Chalah denied ever dealing or even seeing cocaine before. He said he learned about cocaine from Miller, yet claimed to

not know Miller very well and to have only met him once before. Chalah did admit that after his first call with Miller, the police told him to try to sell Miller one kilo.

Kevin Glaser (hereinafter "Glaser"), the undercover agent from the M.S.H.P., was the Government's next witness. Glaser explained his participation in the investigation at the Drury Inn. He identified the videotape, the drugs, the suitcase and the photographs taken of the drugs. The videotape was played for the jury during Glaser's testimony. Prior to the tape being played, Miller and Wallace renewed their objections to it being played on the grounds of entrapment and outrageous government conduct.

Glaser identified Wallace as carrying the suitcase upon Miller's return. He also describes Wallace's participation with the money in the suitcase and the drugs. Glaser testified that after Wallace left the room, Miller was arrested. He admitted that Miller could not have left the motel with the drugs. He agreed that the only way Miller made any deal was because the Government supplied the drugs to create the crime. Glaser refused to admit that the reason they paged Miller

after he left the motel the first time was because they wanted to make sure he would come back. He admitted he never saw a gun on Miller.

Glaser agreed that no one ever introduced Wallace to him. Glaser conceded he handed the knife to Wallace to examine the drugs. Glaser said the police report is wrong where it states Miller carried the suitcase into the room. He agreed that he knew nothing about any agreement between Miller and Wallace. Glaser denied knowing the court order allowing the M.S.H.P. to use the cocaine was expired.

Charles Boschert, a St. Louis County Police Officer assigned to the D.E.A. drug task force, also testified. He said that he was assigned to parking lot surveillance at the Drury Inn on October 12, 1991. Boschert said the first time Miller arrived alone in a Ford Bronco, in which he later left. He stated that Miller returned later in a black Chevrolet Cavalier convertible, and was following a light-colored Oldsmobile rental car driven by Calvin Wallace. Boschert stated he saw Wallace waiting at a side door of the motel with a suitcase while Miller went around and opened the door for Wallace from the inside. He later saw

Wallace exit the motel and be placed under arrest. Boschert admitted he could not see where either car parked. He conceded he could not tell which car the suitcase came from. Boschert agreed there was confusion about the color and type of car Miller was driving upon his return.

On February 19, 1993, the Government continued its case with Wayne McKuin (hereinafter "McKuin"), the owner of Communications Specialists which sells and rents pagers. McKuin testified that Wallace had been a customer since 1988. He stated that pager numbers 848-6995 and 848-8738 were activated and in use on October 10 through 12, 1991. McKuin admitted that on October 10, 1991, Wallace asked for those same two pager numbers to be cancelled.

The Government's ninth witness was Trooper Kenneth Wakefield (hereinafter "Wakefield"), who was assigned as the case agent for the M.S.H.P. Wakefield testified to the chain of custody of the cocaine and marijuana used in the reverse operation. He explained that his location on October 12, 1991, during the investigation at the Drury Inn was in the surveillance room with television monitors of Chalah's room across the

hall. He said he witnessed the transactions occurring in Chalah's room via a hidden camera and microphone. Wakefield testified that he participated in the arrest of Miller. He told the jury about the street value of the quantities of cocaine and marijuana involved in the transaction. Wakefield stated that the amounts involved in the deal would be for distribution, not personal use.

Wakefield admitted that Chalah's marijuana had been seized in Louisiana, so the M.S.H.P. had to get drugs from their locker to sell. He conceded that there was no chance that either Miller or Wallace would have actually ever been able to leave the motel with the drugs involved. Wakefield admitted that the purity level of the cocaine affects its street value. He denied knowing the court order allowing the M.S.H.P. to use the cocaine had expired 180 days from August 21, 1990.

Miller and Wallace then objected to the Government's use of the cocaine in violation of the expired August 21, 1990, court order, and any attempt by the Government to use the April 21, 1992 order to rehabilitate the Government's conduct. Miller argued that the actions of the Government in

violation of the expired order amounted to outrageous government conduct requiring a judgment of acquittal. The Court held that the issue of outrageous government conduct was a legal issue for it to decide as opposed to the issue of entrapment which was for the jury to decide. After examining both orders, the Court refused to allow any further references to them by any party.

Wakefield conceded that Chalah was not bringing cocaine into Missouri. Wakefield admitted that in his police report, he stated that Miller carried the suitcase into the hotel. He testified that information about who carried the suitcase was based upon what D.E.A. Detective Jim Maier told him.

The Government's final witness was Darrell Skaggs (hereinafter "Skaggs"), a Special Agent with the D.E.A. who coordinated the surveillance efforts and the D.E.A.'s involvement in the operation. Skaggs testified that he saw Wallace carry the suitcase up to the back door of the motel while Miller went around and opened it from the inside for Wallace. Skaggs testified that after Miller and Wallace were arrested, he attempted to locate Miller's car. He stated that they were unsure

about the color of the car Miller was driving, so they placed a call to his mobile phone in an attempt to locate it in the parking lot. Skaggs explained how he searched the unlocked vehicle and located the Ruger, model P-85, nine millimeter semi-automatic pistol. He also testified to the seizure of the money and subsequent transfer of it to a cashier's check in the amount of $157,560.00.

Skaggs admitted that Miller did not have a gun on his person when he was arrested. He conceded that when he entered the car where the gun was found, he did not know who the car belonged to, that he had not been invited to enter it, and that he did not have a warrant to search it. He acknowledged that he had not seen where Miller had parked. Skaggs agreed that he did not know which car the suitcase came from. Skaggs testified that Miller had the key to the suitcase. He said he was told that Miller carried the suitcase into the motel room. However, he admitted that they failed to seize Miller's car keys as evidence to be certain they matched the car where the gun was found.

At the close of the Government's evidence, Miller moved for a judgment of acquittal. Neither

Miller nor Wallace presented any evidence. Miller renewed his Motion for Judgment of Acquittal at the close of all the evidence, and filed a written Motion with the court. The Court denied all Motions for Judgment of Acquittal. On February 22, 1993, after deliberation the jury found Miller guilty as charged in both counts of the Indictment. Miller was subsequently remanded to the custody of the United States Marshal. On March 30, 1993, a Presentence Investigation Report (hereinafter "PSR") was prepared. On April 20, 1993, Miller filed his objections to the PSR. On May 7, 1993, the PSR was approved and an Addendum was added thereto. On May 14, 1993, after ruling on Miller's objections, the Court sentenced him to 146 months on Count I, and 60 months on Count II, to be served consecutively. The Court also sentenced Miller to five years of supervised released on Count I, and three years on Count II to run concurrently. Miller was also ordered to pay a special assessment of $100.00. On May 21, 1993, Miller timely filed his Notice of Appeal from the Judgment and Sentence in this case to the United States Court of Appeals for the Eighth Circuit.

On April 7, 1994, the Eighth Circuit reversed Miller's conviction on Count I and remanded with directions to dismiss the charge with prejudice. However, the Court refused to reverse Miller's conviction on Count II on any of the grounds asserted. On April 21, 1994, Miller timely filed a Motion for Rehearing. The Court denied the Motion on April 29, 1994.

REASONS FOR GRANTING WRIT OF CERTIORARI

Writ of Certiorari should be granted on this Petition because (1) it presents important constitutional issues which have never been addressed by the Court; (2) it presents important constitutional issues which have been decided in conflict among courts of appeals; and (3) presents this Court with an opportunity to re-examine Grady v. Corbin which was overturned in the divided opinion of United States v. Dixon.

Miller successfully challenged his conviction for conspiracy to possess with intent to distribute cocaine and marijuana based upon a violation of the Speedy Trial Act, which requires an indictment to be filed within thirty days after a defendant is arrested or charged by summons with a crime. 18 U.S.C. §3161(b). The Court correctly found that a

violation of this deadline results in a mandatory dismissal of the charges. 18 U.S.C. §3162(a)(1). After discussing the factors as delineated in §3162(a)(1), the Court found the District Court erred in adopting the Magistrate's Report and Recommendation.

The Eighth Circuit held that the Government bears the burden of explaining the facts and circumstances which led to the dismissal because it violated the Act. The Court said the District Court improperly placed the burden of explaining the violation upon Miller. The Court found the Government failed to justify the lengthy delay. The Court also found the court below erred in not giving weight to the length of the delay, in this case eighty-eight (88) days between arrest and dismissal.

A. Double Jeopardy Claim

The Court rejected Miller's argument that he should not be prosecuted on the firearm charge because it incorporates all of the essential elements of the drug trafficking offense, which was charged in the first prosecution that should have been dismissed with prejudice. The Court found that jeopardy does not attach until a jury is

empaneled and sworn. However, Miller asserts that "constructive jeopardy" should apply to protect him from a successive prosecution in this rare circumstance.

Although the dismissal with prejudice of Count I for a violation of the Speedy Trial Act is not a factual determination of guilt or innocence of the elements of that drug trafficking crime, Miller should still be protected from twice being placed in jeopardy of life or limb for essentially the same offense. Amend. 5. Title 18 U.S.C. §924(c)(1) states:

> Whoever, during and in relation to any . . . drug trafficking crime for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall in addition to the punishment provided for such . . . drug trafficking crime, be sentenced to imprisonment for five years . . . [N]or shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the . . . drug trafficking crime in which the firearm was used or carried. (emphasis added) §924(c)(1).

A defendant cannot be prosecuted under §924(c)(1) unless he is simultaneously prosecuted for the predicate offense. Likewise, he cannot be punished under §924(c)(1) without having a drug trafficking sentence to impose the firearm time consecutive

thereto. Therefore, the two crimes are inextricably bound as if one offense.

Miller has found no case where this Court has addressed this issue. Miller did find cases where a defendant has been convicted for a violation of §924(c)(1) without first being found guilty of a drug trafficking crime or crime of violence in the same case. In United States v. Frayer, 9 F.3d 1367, 1372 (8th Cir. 1993), and United States v. Munoz-Fabela, 398 F.2d 908, 910 (5th Cir. 1990), convictions under §924(c) for carrying a firearm in relation to a drug trafficking crime were upheld even though there was no conviction for the underlying drug offense. However, in United States v. Willis, 6 F.3d 257, 264 (5th Cir. 1993), the Court held that the Government must prove beyond a reasonable doubt that the defendant committed the drug trafficking crime to convict him under §924(c)(1). Herein lies a conflict between the Circuit Courts.

Although the dismissal of Count I may have been on a technical violation of the Speedy Trial Act, it still prevents Miller's subsequent prosecution under §924(c)(1). It leaves no drug trafficking crime for which the Government may

prosecute nor any drug trafficking conviction for the firearm sentence to follow. If the District Court would have properly dismissed Miller's first charge of conspiracy to possess with intent to distribute drugs with prejudice on January 10, 1992, then there never would have been a trial on that count in February, 1993.

The Government should not have been allowed to issue Count I of the suppressed Indictment on October 1, 1993. Without an indictment for a drug trafficking crime, there can be no indictment for use of a gun in relation thereto. If there can be no indictment, there can be no trial or conviction. Except for these extremely unusual procedural circumstances, Miller would never have been indicted or convicted on Count II. Because the Eighth Circuit said Miller should never have been indicted and tried for Count I, it should have also reversed his conviction on Count II.

This Court recently overruled the "same conduct" test of Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), in the five to four split decision of United States v. Dixon, ____ U.S. ____, 113 S.Ct. 2849, 125 L.Ed. 2d 556 (1993). Nevertheless, the Double Jeopardy concerns in Grady

fit this narrow situation. The same long-standing principles of finality and freedom from Government oppression should apply here. Dixon, 113 S.Ct. at 2877.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. (emphasis added). Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957).

Constructive jeopardy should have attached to Count II of the indictment.

The Court overlooked the difference between the facts in this case and those in United States v. Scott, 427 U.S. 82, 98 S.Ct. 2187, 57 L.Ed. 2d 65 (1978). This case is distinguishable from Scott because there the defendant successfully sought termination of the first proceeding against him. 98 S.Ct. at 2196. Here, the Government requested dismissal of the first complaint. This is not a case where blame for the delay and the consequences of it can be placed at the Defendant's feet.

Miller concedes that he did not raise this issue in this precise way on appeal, but he also

did not contemplate a reversal of only Count I. However, he did make this argument in his Petition for Rehearing which was denied. This Court can exercise its discretion to either address this issue or remand it to the Eighth Circuit for consideration. Dixon, 113 S.Ct. at 2859-2860, n.9. Justice will not be served if this legal theory is not given thorough constitutional analysis.

B. Speedy Trial Claim

The Eighth Circuit rejected Miller's claim that his indictment for violating §924(c)(1) also should have been dismissed under the Sixth Amendment speedy trial clause as well as the Speedy Trial Act. The Court analyzed Miller's claim under United States v. Savage, 863 F.2d 595 (8th Cir. 1988), and found Miller failed to show the pre-indictment delay was unreasonable and substantially prejudicial to his case. However, the test set forth in Savage is not the applicable standard.

Doggett v. United States, ____ U.S. ___, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), reiterates the four separate inquiries first set out in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1992), which are (1) whether delay before trial was uncommonly long, (2) whether the government or

defendant is more to blame for the delay, (3) whether the defendant asserted his right, and (4) whether the defendant suffered any prejudice as a result of the delay. 112 S.Ct. at 2690.

Miller was arrested on October 14, 1991, and charged with conspiracy to possess with intent to distribute cocaine and marijuana. Neither an information was filed nor an indictment obtained within thirty days. On January 10, 1992, the Magistrate dismissed the Complaint at the Government's behest, albeit with no explanation. At this point, Miller could not know why the Government did not wish to proceed, but he had no assurances that the Government would not later prosecute. Nearly a year later on October 1, 1992, a two Count suppressed Indictment issued against Miller adding the alleged violation of §924(c)(1). On December 3, 1992, Miller was arrested on the Indictment. Miller went to trial for the charges on February 17, 1993.

First, the one year and four months between his arrest and initial accusation and subsequent trial was lengthy enough to trigger the Barker inquiry. Doggett, 112 S.Ct. at 2690-2691, n. 1. Second, in accordance with the Eighth Circuit's

findings, there can be no doubt that the Government is entirely to blame for the delay of nearly a year between Miller's arrest and subsequent Indictment. The fact that no charges were pending between January 10 and October 1, 1992, does not change the nature of the inquiry. Miller was still subject to prosecution during this entire period, and compelled "to live in a continuing state of anxiety and insecurity . . ." Green, 78 S.Ct. at 223. Third, Miller timely asserted his speedy trial claim by filing a Motion to Dismiss the Indictment on January 8, 1993.

Finally, the defendant must show prejudice. Courts have recognized more than one sort of harm as a result of unreasonable delay between formal accusation and trial. Doggett, 112 S.Ct. at 2692. During the period of delay, Miller was free either on bond or because no charges were pending. However, he still suffered the anxiety and concern of an accused. Id. Finally, Miller asserts his defense was impaired. How so will become more clear in Section C of this Petition. In any event, Miller asserts prejudice can be presumed in this case based upon the length of the inexcusable delay. Cf. Doggett, 112 S.Ct. at 2692-2694.

Because the Government caused the delay, they should first justify it before Miller must prove the delay damaged his case. It is clear from the Eighth Circuit opinion that the Government cannot now go back and justify the delay due to the unusual procedural events. Therefore, even if prejudice is not presumed, Miller deserves a remand for a hearing to demonstrate prejudice.

The same reasons behind the Speedy Trial Act which demand dismissal of Count I a second time should prevent the Government from trying Miller on Count II. Although the Court correctly quotes the provisions of the Speedy Trial Act regarding consequences for a violation to only "such charge" from the pending complaint, it incorrectly presumes 18 U.S.C. §3162(a) contemplated the later filing of charges, which not only could have but should have been brought together, after dismissal with prejudice of the first complaint. The Act is silent to this situation. Strong public policy concerns of judicial economy and freedom from burdensome Government conduct demand dismissal of Count II on these specific facts.

The Eighth Circuit properly quoted that a defendant's arrest on one charge does not

necessarily trigger his right to a speedy trial on another charge filed after his arrest. (emphasis added) Savage, 863 F.2d at 597. However, that quote must be taken in the context of the cases where it was used, i.e. where the arrest on a first charge was completely unrelated to a charge subsequently filed. That is not the case here. The facts cannot be examined outside the context of the Government knowing full well at the time of the initial indictment that Miller could have been charged then with Count II. For some unknown reason, the Government did not choose to add Count II at first. The Government sat on the case, perhaps recognized it was in violation of the Speedy Trial Act, voluntarily dismissed the case, and then waited nearly a year to re-charge and add Count II.

Under these facts, the Government should not be allowed a second bite at the apple for a charge that arose from the same facts as the initial arrest for Count I. The Government had all the evidence it needed at the time of the initial arrest to charge Miller with use of a gun in relation to a drug trafficking crime. No additional investigation was conducted nor evidence

gathered after October 14, 1991. Because the Government caused the delay, they should first justify it before Miller must prove the delay damaged his case. As is clear from the Eighth Circuit opinion, the Government cannot now go back and justify the delay due to the unusual procedural events. Therefore, even if prejudice is not presumed, Miller deserves a remand for a hearing to demonstrate prejudice.

C. Due Process Claim

Count I was not dismissed with prejudice until the appellate level, so Miller was forced to prepare and present his defense at trial to both Counts I and II. As a result of the dismissal of the drug trafficking charge after trial, Miller was not given his Due Process rights or a fair trial on the weapons charge. Miller did not testify at trial. However, had he been defending against only the gun charge, he more than likely would have. Because the evidence obtained in this case was through a "reverse sting" operation, the evidence against Miller on the drug charge was overwhelming. The Government had a confidential informant witness, taped telephone conversations, an undercover agent witness and a videotape of the

drug transaction. If Miller had only been defending against Count II, he would not have been concerned with any of the drug transaction evidence. Defending against Count II alone changes the entire posture of the case and his defense.

On the other hand, the evidence on the firearm charge was weak. The Government claimed the gun was found in a car on the motel parking lot believed to have been operated by Miller. No officer could say it was Miller's car. The officers allegedly located the car by placing a call to Miller's mobile phone number, and then searching the lot for a car with a ringing phone. The officer claimed the car was unlocked, and that the gun was in an unzipped bag clearly visible on the driver's side floor. Miller's testimony would have refuted all the allegations in connection with the gun. Further, he could have presented affirmative evidence that he was not aware a gun was in the car, if in fact the car was even the one he drove onto the lot. He may even have been able to prove the gun belonged to someone else, or that the police planted the gun in the car. The Government presented no evidence the gun had Miller's fingerprints on it. There was no evidence

about who owned the gun because the serial number was illegible.

Under the Sixth Amendment, a defendant has the right to "be informed of the nature and cause of the accusation." Amend. 6. Here, Miller was improperly informed of the accusations against him because there really should have been no drug trafficking charge. He was not able to prepare or present his defense to the only charge he could have had against him, i.e. use of a firearm in relation to a drug trafficking crime. Because he was not properly advised of the charges, his due process rights to prepare his defense based on the charges and to a fair trial were likewise violated. If this Court should find a charge under 18 U.S.C. §924(c)(1) can stand alone, Miller asserts he must be granted a new trial on that charge alone so he can properly prepare his defense thereto.

D. Warrantless Search and Seizure Claim

Miller filed a Motion to Suppress Tangible Evidence and Suggestions in Support thereof, which was denied by the Magistrate. The District Court adopted this ruling as well. Miller preserved his objection to admission of the gun throughout the trial. The Eighth Circuit, in a footnote, found

his claim to be without merit relying on United States v. Walker, 900 F.2d 1201 (8th Cir. 1990). The Court ignored Miller's citation to the more recent case of United States v. Marshall, 986 F.2d 1171 (8th Cir. 1993).

There was insufficient evidence to support a finding that Miller's alleged car was subject to forfeiture under 21 U.S.C. §881(a)(4). Here, Appellant asserts the D.E.A.'s so-called "inventory search" was unreasonable under the circumstances. The Government did not even know which car was Miller's. Agent Skaggs admitted he did not know the car belonged to Miller when he searched it. Strangely, the D.E.A. failed to seize as evidence Miller's car keys. Likewise, the D.E.A. failed to test for fingerprints on the gun.

Miller asserts that the failure of the government agents to seek a search warrant for the interior of the car when there was no danger of loss of evidence contained therein was unjustified by the D.E.A.'s administrative policy. Further, Miller believes the evidence establishes that the motive for the search was really investigatory. There was also no evidence that "standard procedures" were followed. In fact, the car had

not already been impounded before the search. Administrative policy cannot overcome the constitutional demands of the Fourth Amendment without other "exigent circumstances" to justify failure to obtain a search warrant. The gun was, therefore, fruit of the poisonous tree and inadmissible at trial.

CONCLUSION

For the reasons set forth above, Petitioner respectfully request this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review its judgment and opinion in this case.

Dated: July 27, 1994.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2451

UNITED STATES OF AMERICA,	*	
	*	
Plaintiff - Appellee,	*	
	*	Appeals from the
v.	*	United States
	*	District Court
DERRICK MILLER,	*	for the Eastern
	*	District
Defendant - Appellant.	*	of Missouri

No. 93-2936

UNITED STATES OF AMERICA,	*	
	*	
Plaintiff - Appellee,	*	
	*	
v.	*	
	*	
CALVIN WALLACE,	*	
	*	
Defendant - Appellant.	*	

Submitted: December 16, 1993

Filed: April 7, 1994

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge

Derrick Miler and Calvin Wallace were convicted of conspiracy to possess cocaine and marijuana with intent to distribute in violation of 21 U.S.C. § 924(c) (1988). We vacate the defendants' convictions for conspiracy to possess with intent to distribute and remand to the district court with instructions to dismiss this count of the indictments with prejudice. Miller's firearm conviction is affirmed.

I. BACKGROUND

Morris Chalah, a confidential informant[1], telephoned Miller and arranged to sell him ten kilograms of cocaine and twenty-five pounds of marijuana. On October 21, 1991, Chalah, Miler, and Kevin Glaser, an undercover police officer, met at a motel room. Miller inspected the cocaine and marijuana, took samples of the drugs, and indicated he would return with the money. Later that night, Miller returned to the motel accompanied by Wallace, who carried a suitcase containing $157,650.00 in cash. After they showed Chalah and Glaser the money, Miller and Wallace examined the

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[1]On October 10, 1991, Chalah was arrested in Louisiana for possession of approximately twenty-four pounds of marijuana. Chalah told officers he was delivering the drugs to "Derrick" in St. Louis.

drugs and discussed the transaction. Miller told Wallace to go get the car, and Wallace left the motel room. The defendants were then arrested. When Miller's car was searched, officers found an open bag on the floor beneath the steering wheel that contained a loaded semi-automatic pistol.

The government filed complaints on October 14, 1991, charging Miller and Wallace with conspiracy to possess cocaine and marijuana with intent to distribute. One week later, the magistrate determined there was probable cause and bound the defendants over for trial. Nothing further transpired until January 2, 1992, when Wallace filed a motion to dismiss under the Speedy Trial Act. On January 9, the prosecutor requested that the complaints be dismissed because the government "had decided not to proceed with criminal prosecution at this time." The court dismissed the complaints on January 10, but failed to state whether the dismissal was with or without prejudice.[2]

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[2]The Court notes that the Assistant United States Attorney who presented the case on appeal is not the attorney who represented the government at the time the complaints were filed and later dismissed.

On October 1, 1992, a grand jury indicted Miller and Wallace for conspiracy to possess cocaine and marijuana with intent to distribute ("Count I") and indicted Miller for carrying a firearm during a drug trafficking offense ("Count II"). Miller was convicted and sentenced to two hundred six months (one hundred forty-six on Count I and sixty on Count II) and ordered to pay a special assessment of $100.00. Wallace was convicted and sentenced to one hundred thirty months and ordered to pay a special assessment of $50.00. The defendants appeal.

II. DISCUSSION

A. The Consequences of the Pre-Indictment Delay

Pursuant to the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1988) ("Act"), an indictment must be filed within thirty days after a defendant is arrested or charged by summons with a crime. Id. § 3161(b). A violation of this deadline results in the mandatory dismissal of the charges. Id. § 3162(a)(1). The Act does not specify that the dismissal be either with or without prejudice; rather, the district court makes this determination. Id. In deciding whether to dismiss with or without prejudice, "the court shall

consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." Id.

The government's failure to file indictments or dismiss the complaints against Miller and Wallace within the proscribed thirty-day period was a clear violation of the Act.[3] When a court dismisses a complaint outside the thirty-day period and is silent as to whether the dismissal is with or without prejudice, "a subsequently filed indictment should be dismissed only if the complaint should have been dismissed with prejudice." United States v. Bittle, 699 F.2d 1201, 1207 (D.C. Cir. 1983). The district court adopted the magistrate's report and recommendation that the original complaints should have been

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[3]If the government had dismissed the complaint within thirty days after the defendants' arrests, then no violation of the Act would have occurred. See, e.g., United States v. Long, 900 F.2d 1270, 1274 (8th Cir. 1990) involving the dismissal of a complaint before the period for indictment had elapsed). Section 18 U.S.C. 3161(d)(1) does not control because the complaints were not dismissed or indictments filed within the thirty-day period as contemplated by that section. See United States v. Bittle, 699 F.2d 1201, 1208 (D.C. Cir. 1983).

dismissed without prejudice. We review the district court's evaluation of the factors outlined in the Act for an abuse of discretion. United States v. Wiley, 997 F.2d 378, 385 (8th Cir.), cert. denied, 114 S.Ct. 600 (1993).

The defendants do not dispute the seriousness of the offense. Our difficulty is with the second factor, the facts and circumstances which led to the dismissal of this case. The government suggested no reason why the complaints were not dismissed or indictments filed within the thirty-day period. Instead, the government claimed that the delay was unintentional and inadvertent. The defendants argued that the government intentionally delayed this case in order to gain a tactical advantage. The court noted that the defendants failed to offer evidence concerning the cause of the delay. The court concluded, "[t]here is simply nothing before the Court upon which any kind of informed decision can be made as to this factor." In considering the third factor, the impact of reprosecution of [sic] the administration of justice and the Act, the court found no showing that the government's conduct was part of a continuing pattern of disregard for the mandates of

the Act. Finally, the court found the defendants failed to prove the delay had caused actual prejudice.

"An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment." United States v. Kramer, 827 F.2d 1174, 1179 (8th Cir. 1987). In this case, the complaints were dismissed eighty-eight days after the defendants were arrested; this is not a short delay beyond the thirty-day time limit. See Bittle, 699 F.2d at 1208 (describing as a short delay where the Act was violated by thirteen days). There is no indication in the record that the court considered the length of the delay as one of the circumstances surrounding the dismissal of this case. The court thus abused its discretion in failing to consider the length of the delay and in concluding there was nothing in the record upon which an informed decision could be made concerning this factor.

The court also improperly required the defendants to explain the government's delay in pursuing indictments against them. The defendants, obviously, do not have access to information concerning the cause for the government's delay unless they are supplied with that information by the government. Therefore, the government bears the burden of explaining the circumstances that lead to the dismissal of this case. The government violated this statute, not the defendants, and should in all fairness be charged with both stating and validating its reasons or bases for the delay. Nevertheless, the government does not suggest any justification for violating the deadline imposed by the Act. See United States v. Jones, 676 F.2d 327, 328-29 (8th Cir.), cert. denied, 459 U.S. 832 (1982) (where a defendant was not charged until several months after his arrest because the government claimed that the publicity from formally charging him would jeopardize ongoing drug enforcement operations and that during the delay the government was negotiating with the defendant). The government's assertion that the delay was undeliberate is not necessarily sufficient to excuse a violation of the Act. United States v.

Russo, 741 F.2d 1264, 1267 (11th Cir. 1984); United States v. Taylor, 487 U.S. 326, 338 (1988) (the government's truly neglectful attitude can be factored against it).

Although our standard of review here is for an abuse of discretion, "[a] judgment that must be arrived at by considering and applying statutory criteria, however, constitutes the application of law to fact and requires the reviewing court to undertake more substantive scrutiny to ensure that the judgment is supported in terms of the factors identified in the statute." Id. at 337. The Act confines the district court's discretion by mandating dismissal upon the violation of precise time limits and specifying the criteria that must be considered in the decision whether to bar reprosecution. Id. at 333, 343-44.

As noted in Taylor, we recognize that the district court's judgment "should not lightly be disturbed." Id. at 337. However, in this case the court failed to consider the length of the delay, placed a burden on the defendants to show the cause for the delay, and failed to consider the government's lack of a reason to justify the delay. These failings constitute an abuse of the court's

statutorily narrowed discretion. Weighing the seriousness of the crime, the facts and circumstances leading to the dismissal as we have outlined above, and the impact of reprosecution on the administration of the Act and on the administration of justice, we hold Count I of the indictments should have been dismissed with prejudice.

B. Miller's Indictment for Carrying a Firearm

1. Double Jeopardy Claim

Miller claims that if his indictment for possession with intent to distribute should have been dismissed with prejudice, then his indictment for carrying a firearm during a drug trafficking offense must also be dismissed. Relying on Grady v. Corbin, 110 S.Ct. 2084 (1990), Miller argues his prosecution on the firearm charge is barred under the Double Jeopardy Clause of the Fifth Amendment.[4] He urges that a defendant may not be prosecuted in a subsequent proceeding for an offense which incorporates all the same conduct as part of its

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[4] "[N]or shall any person be subject to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

essential elements as an offense which was charged in the first prosecution.[5] Id. at 2092-94.[6]

We need not reach the merits of Miller's double jeopardy argument. This is not a case of successive prosecutions or multiple punishments for the same offense. Contrary to the defendant's assertion, jeopardy does not attach until the jury is empaneled and sworn. See Lomax v. Armontrout, 923 F.2d 574, 576 (8th Cir.) cert. denied, 112 S.Ct. 60 (1991) (re-indictment does not violate double jeopardy clause). Furthermore, it does not matter that some of the charges are to be dismissed with prejudice because "a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word, absolute or otherwise." United States v. Scott, 437 U.S.

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[5]The Grady double jeopardy analysis "bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 110 S.Ct. at 2093.

[6]We note the Supreme Court has specifically overruled the Grady "same conduct" test. United States v. Dixon, 113 S.Ct. 2849, 2860 (1993); see also United States v. Rodgers, No. 93-2169, slip op. at 4-6 (8th Cir. Mar. 17, 1994).

82, 98 n.11 (1977). "[T]he dismissal of an indictment for preindictment delay represents a legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation." Id. at 98. It is important to note that the Speedy Trial Act does not create consequences beyond those accompanying the dismissal with prejudice of the particular charge that was subject to the Act's time constraints. 18 U.S.C. § 3162(a)(1) (if the indictment is not filed within the time limit, then "such charge against that individual contained in such complaint shall be dismissed or otherwise dropped.") (emphasis added). The firearm charge was not included in the original complaint and is not subject to dismissal.

2. Speedy Trial Claim

We also reject Miller's speedy trial claim as it relates to his indictment for violating 18 U.S.C. §924(c) (carrying a firearm in relation to a drug trafficking crime). Under constitutional speedy trial analysis,[7] "[p]re-indictment delay will be sufficiently 'oppressive' to warrant

[7]"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . " U.S. Const. amend. VI.

dismissal of an indictment where the delay was unreasonable and substantially prejudicial to the defendant in the presentation of his case." United States v. Savage, 863 F.2d 595, 598 (8th Cir. 1988), cert. denied, 490 U.S. 1082 (1989) (quotation omitted). Miller has failed to meet this burden. The Speedy Trial Act requires dismissal as a sanction for excessive pre-indictment delay when the arrest is based on a charge that is contained in a complaint filed against the defendant. 18 U.S.C. §3162(a)(1); see also United States v. Ray, 768 F.2d 991, 996 (8th Cir. 1985). Because the complaint did not charge Miller with the firearm violation, no violation of the Act occurred with respect to this count of the indictment. A defendant's arrest on one charge does not necessarily trigger the right to a speedy trial on another charge filed after his arrest. Savage, 863 at 597. Consequently, Miller's speedy trial rights were not violated by his conviction under Count II.

We hold that the government's violation of the Speedy Trial Act requires dismissal with prejudice of the charges for conspiracy to possess with intent to distribute. The defendants' remaining

allegations of error are either moot or lack merit.[8]

III. CONCLUSION

We vacate the defendants' convictions for conspiracy to possess cocaine and marijuana with intent to distribute and remand this case to the district court with instructions to dismiss this count of the indictments with prejudice. We affirm Miller's firearm conviction.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

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[8]Miller's contention that the search of his vehicle and seizure of the firearm was unconstitutional is without merit. See United States v. Walker, 900 F.2d 1201, 1203-04 (8th Cir. 1990).

p.c. Edward Rogers
Helton Reed
USM, USP, USPS

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Filed

UNITED STATES OF AMERICA,	)	Jan.21 1993
Plaintiff,	)	U.S.District Court
v.	)	ist.of Mo.
	)	St. Louis
DERRICK MILLER,	)	No. 4:92CR242 DJS
Defendant.	)	

ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

In accordance with the Memorandum filed herewith,

IT IS HEREBY ORDERED that defendant's motions for Production and Inspection of Grand Jury Minutes or Transcripts; for Designation by Government of Intention to Use Evidence at Trial; and for Production of Favorable Evidence are denied as moot.

IT IS FURTHER ORDERED that defendant's motions for Disclosure of Names and Addresses of Witnesses; and for Severance of Defendants are denied.

IT IS FURTHER ORDERED that defendant's Request for Disclosure is granted in part and denied in part.

IT IS FURTHER ORDERED that defendant's Motion for Extension of Time to File Motions Pursuant to Rules 12 and 16, Fed. R. Crim. P. is denied without prejudice to seek leave of the Court to file such other specific motions as may be appropriate.

IT IS FURTHER ORDERED that the government's Motion for Production of Statements of Witnesses is denied.

IT IS FURTHER ORDERED that the government's Motion for Reciprocal Discovery is granted.

IT IS RECOMMENDED that defendant's Motion to Suppress Statements be denied as moot.

IT IS FURTHER RECOMMENDED that defendant's motions to Quash Indictment; to Dismiss Indictment for Failure to Comply with Speedy Trial Act; and to Suppress Tangible Evidence be denied.

The parties are advised that they have eleven (11) days in which to file written objections to these orders and determinations. Failure to timely file objections may result in waiver of the right to appeal questions of fact. Thompson v. Nix, 897 F.2d 356, 357 (8th Cir. 1990).

s/Frederick R. Buckles
UNITED STATES MAGISTRATE JUDGE

Dated this 21st day of January, 1993.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED

UNITED STATES OF AMERICA,	Jan.21,1993
Plaintiff,	U.S.District Court
v.	E.Dist.of Mo.
DERRICK MILLER,	St. Louis
Defendant.	No. 4:92CR242 DJS

MEMORANDUM

The various pretrial motions of the parties were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. §636(b). A hearing was held on the various motions on January 8, 1993.

Defendant's Motions

1. Motion for Extension of Time to File Motions Pursuant to Rules 12 and 16, Fed. R. Crim. P.

In this motion, the defendant makes a general request that he be allowed to file additional motions out of time. The defendant does not state what additional motions he wishes to file. The defendant did present one additional motion out of time, a Motion to Dismiss Indictment for Failure to Comply with Speedy Trial Act, and was granted leave to file the motion. Absent a request to file a

specific motion, this motion should be denied without prejudice to seek leave of the Court to file such other specific motions as may be appropriate.

2. Motion for Production and Inspection of Grand Jury Minutes or Transcripts

The government has agreed to provide the material and information sought by the defendant. Therefore, the defendant's motion should be denied as moot.

3. Motion for Designation by Government of Intention to Use Evidence at Trial

The government states that it has made all such information and evidence available to the defendant. Therefore, the defendant's motion should be denied as moot.

4. Motion for Production of Favorable Evidence

The government states that it will provide to the defendant all of the material and information now in its possession as sought in the defendant's motion and also agrees to provide any such information that might come into its possession at a later time. Therefore, the defendant's motion should be denied as moot.

5. Motion for Disclosure of Names and Addresses of Witnesses

The government is not required to disclose the names or statements of its witnesses prior to the trial of the case. 18 U.S.C. §3500; Rule 16(a)(2), Federal Rules of Criminal Procedure; United States v. Pelton, 578 F.2d 701, 717 (8th Cir.), cert. denied, 439 U.S. 964 (1978). Therefore the defendant's motion should be denied.

6. Request for Disclosure

To the extent that the defendant's motion requests disclosure of material and information required to be disclosed to him by the government under Rule 16(a)(1), Federal Rules of Criminal Procedure, it should be granted. To the extent that the motion requests disclosure of names, addresses and statements of witnesses, it should be denied. See para. 5, above.

7. Motion for Severance of Defendants

As grounds for his motion, the defendant makes two assertions. First, he claims that the government will introduce in evidence post-arrest statements or confessions of his co-defendant; and that his co-defendant may not testify and therefore he will not be able to cross-examine the co-defendant concerning these statements. He also

alleges that his defense is hostile to that of his co-defendant because he will attempt to show that the co-defendant actually possessed the cocaine in question. As to the first claim, the government asserts that it will not offer in evidence at trial of this case any statement of the co-defendant in any manner which would violate the principles announced in Bruton v. United States, 391 U.S. 123 (1968). As to his second assertion, that he will attempt to show that his co-defendant actually possessed the cocaine, the defendant has failed to offer sufficient evidence to require a severance. Those charged in a conspiracy should generally be tried together. United States v. Reeves, 674 F.2d 739, 744 (8th Cir. 1981). Further, the mere assertion that the defendant "may point the finger" at his co-defendant does not compel a severance. United States v. Crotinger, 928 F.2d 203, 206 (6th Cir. 1991). Therefore, the defendant's motion should be denied.

8. Motion to Quash Indictment

The indictment is a plain, concise and definite statement of the essential facts constituting the offense charged and complies in all respects with Rule 7(c), Federal Rules of

Criminal Procedure. The defendant claims that there was insufficient competent evidence presented to the grand jury. An indictment valid on its face is immune from attack by such claims. Costello v. United States, 350 U.S. 359 (1956).

The defendant also claims that by the return of an indictment, he was denied his right to a preliminary hearing. However, the defendant has no right to a preliminary hearing when charged in a legally sufficient indictment. See Lawn v. United States, 355 [sic] 339, 349 (1958); Vincent v. United States, 337 F.2d 891, 896 (8th Cir. 1964), cert. denied, 380 U.S. 988 (1965); 18 U.S.C. §3060(e).

Therefore, the defendant's motion should be denied.

9. Motion to Dismiss Indictment for Failure to Comply with Speedy Trial Act

The defendant here was originally charged by complaint filed October 14, 1991, for events alleged to have occurred on or before the Court on October 14, 1991. He was released on bond the following day. On October 21, 1991, a preliminary examination was conducted and United States Magistrate Judge Catherine D. Perry found probable cause to believe that the defendant had committed

the offense alleged and ordered him to be bound over for trial. Nothing further occurred until January 9, 1992, when the government asked that the complaint be dismissed because "we have decided not to proceed with criminal prosecution at this time." Thereafter, on January 10, 1992, the Court dismissed the complaint. The Court did not indicate whether the dismissal was with or without prejudice.

Thereafter, on October 1, 1992, an indictment was returned by the grand jury charging the defendant with the same offense as alleged in the complaint described above.

This very same situation arose and was discussed thoroughly in United States v. Bittle, 699 F.2d 1201 (D.C.Cir. 1983). In Bittle, the Court noted that a subsequent prosecution is not barred in these circumstances unless the original dismissal was with prejudice. Id. at 1206. The Court then went on to note however, that, as here,

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[1]The government correctly notes that the offense alleged in Count II of the indictment was not alleged in the complaint or otherwise filed against the defendant and therefore is not appropriately the subject of the motion. See United States v. Napolitano, 761 F.2d 135, 137 (2d Cir.), cert. denied, 474 U.S. 842 (1985).

the dismissal of the complaint did not indicate whether the dismissal was with or without prejudice. In such circumstances, the Court held that the "subsequently filed indictment should be dismissed only if the complaint should have been dismissed with prejudice." Id. at 1207. The Court held that in making such a determination, the Court must consider the factors set out in 18 U.S.C. §3162(a)(1), namely the seriousness of the offense, the facts and circumstances of the case which led to the dismissal, and the impact of a re-prosecution on the administration of justice. The statute describes these factors to be considered "among others," indicating that other considerations may come into play in particular circumstances. Following the dictates of Bittle, the above factors are considered here.

The seriousness of the offense alleged cannot be doubted. The facts alleged, if proven, show that the defendants conspired to negotiate the purchase of ten (10) kilograms of cocaine and twenty-five (25) pounds of marijuana. In furtherance of their efforts, they were able on short notice to secure over $100,000.00 with which to make the purchase. They were ready, willing and

able to proceed with the transaction and were thwarted only by virtue of the fact that, unbeknownst to them, the prospective seller was a government agent.

Turning to the next point for consideration, the facts and circumstances of the case which led to the dismissal, nothing can be said other than that the record is bare as to any explanation for the delay. The government gave no reason to the Court for its original dismissal other than to say that it had decided not to proceed with prosecution at that time. Nor does the government offer any explanation in its response to the defendant's motion. The government offered no evidence at the motion hearing as to the reason for the delay. Nothing is offered to explain the delay other than to say that it was unintentional. The defendant argues that the delay was intentional and designed to gain a tactical advantage over the defendant. Suffice it to say that the defendant's position and argument are not more supported by the record than the government's assertion. The defendant offered no evidence at the motion hearing as to the cause for the delay. Nor did he explain why he did not ask the Court in January of 1992 to dismiss the

cause with prejudice. There is simply nothing before the Court upon which any kind of informed decision can be made as to this factor.

In considering the impact of a re-prosecution on the administration of justice and on the administration of the Speedy Trial Act, the undersigned notes that there has been no evidence adduced that the conduct by the government in this case is a part of any continuing pattern of conduct evidencing a disregard for either the rights of defendants or the dictates of the Speedy Trial Act. Because there has been no such showing here, to order dismissal of this cause would serve no purpose to deter such conduct. See United States v. Hastings, 847 F.2d 920, 926-29 (1st Cir. 1988).

The defendant also asserts that the delay has worked to his actual prejudice. He asserts, through the affidavit of his attorney, that he no longer has sufficient funds to conduct an adequate investigation, that the defendant cannot remember the names of two crucial witnesses because of memory loss due to the delay, and that the indictment comes at a very busy time in counsel's schedule. If the defendant does not have sufficient funds to investigate the charges here,

he may apply to the Court for assistance under 18 U.S.C. §3006A(6)(e). He has not done so. Other than to assert that he cannot now remember the names of the witnesses who are important to his defense, he offers nothing further as to who such witnesses are or why they are important to his defense. It is reasonable to presume that if the witnesses were important, the defendant would have provided information about them to his attorney at the time the charges were originally filed. Lastly, conflicts in counsel's schedule can be brought to the attention of the trial court and dealt with accordingly.

Considering all of these factors here, it cannot be said that the prosecution in this case should be terminated by dismissal with prejudice. Therefore, the defendant's motion should be denied.

10. Motion to Suppress Statements; and

11. Motion to Suppress Tangible Objects

A hearing was held on the defendant's motions on January 8, 1993. At the hearing, testimony and evidence was adduced on the motions. From the testimony and evidence adduced, the undersigned makes the following findings of fact and conclusions of law.

Findings of Fact

On October 10, 1991, an officer of the Louisiana State Police stopped a car driven by Moris Chalah in the State of Louisiana. In a search of the car, officers found twenty-five (25) pounds of marijuana. Chalah subsequently told the officers that he was taking the marijuana to St. Louis, Missouri, to deliver to a person known to him as "Derrick". He provided the officers with telephone numbers for "Derrick's" pager and car telephone.

At the request of the officers, on October 10 and 11, 1991, Chalah placed a number of telephone calls to "Derrick," which calls were monitored and recorded by the officers. Both the monitoring and recording were done with the consent of Chalah as evidenced by his written consent. (See Government's Exh. 1). In these conversations, arrangements were made for "Derrick" to purchase cocaine, as well as the marijuana.

Louisiana police then contacted officers of the Missouri Highway Patrol. In order to continue the investigation, officers of the patrol, working with agents of the Drugs Enforcement Administration (DEA), on October 12, 1991, rented three rooms at

a hotel in St. Louis, Missouri. One of the rooms was to be occupied by Chalah; one by an undercover police officer posing as a cocaine seller; and the third room by other surveillance officers. The room occupied by Chalah was equipped with audio and video recording devices. The undercover officer posing as a cocaine seller had in his possession a large quantity of cocaine which had been obtained from the evidence vault of the Missouri Highway Patrol.

Once at the hotel, Chalah made a telephone call to "Derrick" from a public telephone in the lobby. An attempt was made to record the telephone call but the effort failed and the recording is inaudible. Chalah consented to the recording of the conversation.

At approximately 8:30 p.m., defendant Derrick Miller arrived and met with Chalah at the hotel room occupied by Chalah. They then discussed the cocaine transaction. Miller asked to see a sample. Chalah contacted the undercover officer who then came to the room with the cocaine. Miller opened the packages and took a sample. Miller then left. Officers on surveillance saw him leave the hotel and drive away from the area. Later, Miller

returned driving a small white convertible car. Calvin Wallace also arrived driving a white Oldsmobile. Miller and Wallace then went to Chalah's room. Wallace carried into the room a suitcase containing $157,000.00 in currency. The cocaine and money were exchanged. Miller then told Wallace to bring the car around and Wallace left the room. Wallace was arrested as he walked to his car in the parking lot. Miller was arrested in the hotel room.

All of the activities and conversations between Miller, Chalah, Wallace and the undercover officer in Chalah's room were recorded on audio and video tape. These recordings were made with the consent of Chalah.

The automobile which Wallace drove to the hotel was seized and an inventory of the car was conducted pursuant to DEA policy. In the car, they found $191.00 in currency and documents indicating the vehicle had been rented. The automobile was subsequently returned to the rental agency.

Surveillance agents had seen Miller arrive at the hotel on his return trip in a small white convertible, however they did not see where he had parked the auto. After Miller's arrest, they

searched the parking area of the hotel and located several convertibles but were unable to determine which of those had been driven by Miller. They then contacted the undercover officer inside the hotel and asked him to dial the telephone number which Chalah had given the officers as Miller's car telephone number. The undercover officer did so and a telephone in one of the convertibles started ringing. DEA Agent Skaggs then opened the car, answered the phone and notified the undercover officer that the convertible had been located. Pursuant to DEA policy, Agent Skaggs did a brief inventory of the car. On the front floor under the steering column he saw a small bag, inside of which he saw a semi-automatic pistol, which he seized. The car was then towed to a DEA storage facility and several days later a more detailed inventory search was made of the vehicle and a number of documents and other items were seized from the vehicle. All of this was done according to DEA policy which states that an agent when seizing a vehicle should make a brief inventory search of the vehicle on site and then remove the vehicle to a secure facility.

No evidence was introduced at the hearing that either Wallace or Miller made any statements to law enforcement officers following their arrests and it is assumed therefore that the government does not intend to offer any such evidence.

Discussion

The audio and video tape recordings of the telephone calls, and conversations and activities in the hotel room, were all made with the consent of Moris Chalah, one of the participants in the conversations and activity and were therefore made lawfully and are admissible in evidence. United States v. White, 401 U.S. 745 (1971); 18 U.S.C. §2511(2)(d).

The arrests of the defendants were lawful, being made after law enforcement officers saw the defendants committing offenses in their presence. See Gerstein v. Pugh, 420 U.S. 103 (1975); United States v. Watson, 423 U.S. 411 (1976).

The searches of the two vehicles were lawful. The vehicles were subject to seizure and forfeiture because they were used and intended to be used to transport and to facilitate the transport of controlled substances. See 21 U.S.C. §881(1)(4). Because the vehicles were subject to forfeiture,

the vehicles could be seized and an inventory made of the contents of the vehicles in accordance with established DEA policy. See United States v. Walker, 900 F.2d 1201, 1204-05 (8th Cir. (1990); South Dakota v. Opperman, 428 U.S. 364 (1976). The search is not invalid because the agents moved the vehicle or because they waited a number of days to complete the detailed inventory. United States v. Woolbright, 831 F.2d 1390, 1395 (8th Cir. 1987). Therefore, the items seized from the automobiles were lawfully seized and are admissible as evidence.

Conclusion

For all of the foregoing reasons, the defendant's Motion to Suppress Statements should be denied as moot. The defendant's Motion to Suppress Tangible Evidence should be denied.

Government's Motions

1. Motion for Production of Statements of Witnesses

The defendant is not required to disclose the statements of his witnesses prior to the trial of the case. Rules 16(b)(2) and 26.2, Federal Rules of Criminal Procedure; United States v. Felt, 502 F.Supp. 71, 73-74 (D.D.C. 1980). Therefore, the government's motion should be denied.

2. Motion for Reciprocal Discovery

The government seeks discovery of material and information required to be produced by the defendant pursuant to Rule 16(b)(1), Federal Rules of Criminal Procedure. No response has been filed to the motion. Therefore, the government's motion should be granted.

An Order and Recommendation on the parties' various motions is filed herewith.

s/Frederick R. Buckles
UNITED STATES MAGISTRATE JUDGE

Dated this 21st day of January, 1993.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 4:92CR242-DJS**
	)	
DERRICK MILLER,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the recommendation of the United States Magistrate Judge and defendant's objections thereto. Pursuant to 28 U.S.C. §636(b)(1) this Court makes a de novo determination of those portions of the recommendation to which objections are made. Pending before the Court are defendant's motions to dismiss indictment for failure to comply with the Speedy Trial Act; to suppress tangible evidence; and to quash indictment. The magistrate judge recommends that the motions be denied.

1. MOTION TO DISMISS INDICTMENT FOR FAILURE TO COMPLY WITH SPEEDY TRIAL ACT.

The pertinent facts to this motion, as accurately stated by the magistrate judge in his recommendation, are as follows:

> The defendant here was originally charged by complaint filed October 14, 1991, for events alleged to have occurred on or about October 12, 1991. The defendant made an initial appearance before the Court on October 14, 1991. He was released on bond the following day. On October 21, 1991, a preliminary examination was conducted and United States Magistrate Catherine D. Perry found probable cause to believe that the defendant had committed the offense alleged and ordered him to be bound over for trial. Nothing further occurred until January 9, 1992, when the government asked that the complaint be dismissed because "we have decided not to proceed with criminal prosecution at this time." Thereafter, on January 10, 1992, the Court dismissed the complaint. The Court did not indicate whether the dismissal was with or without prejudice.
>
> Thereafter, on October 1, 1992, an indictment was returned by the grand jury charging the defendant with the same offense alleged in the complaint described above.

(Recommendation, pp.4-5). The magistrate judge compared the instant case to United States v. Bittle, 699 F.2d 1201 (D.C. Cir. 1983), and applied the factors set out in 18 U.S.C. §3162(a)(1), as the court in Bittle had done, to the facts in this case. The magistrate judge then concluded that the dismissal of the original complaint should be held to be dismissed without prejudice.

Defendant argues that the magistrate judge erroneously relied on Bittle, which defendant states is not applicable to the instant case.

Defendant argues that this action is governed by United States v. Long, 900 F.2d 1270 (8th Cir. 1990), which treats the 30 day pre-indictment period separately from the 70 day speedy trial period. However, defendant has failed to state specifically how Long is applicable to the instant case. The Court has reviewed Long and is unable to determine how Long mandates that the instant indictment be dismissed. Additionally, this Court finds that the magistrate judge correctly relied on Bittle.

Defendant also asserts that the has a "right to require the government to begin this prosecution anew even if dismissal is without prejudice, for 'dismissal without prejudice is not a toothless sanction; it forces the government to obtain a new indictment if it decides to prosecute..' [United States v. Taylor,] (487 U.S. at 342)." This is exactly what happened in this action. The complaint was dismissed and when the government decided to reprosecute it then sought an indictment.

Defendant objects to the magistrate judge's analysis of the reason for the dismissal of the earlier complaint, which is one of the factors the

Court must consider pursuant to 18 U.S.C. §3162(a)(2). Defendant argues that the magistrate judge erroneously placed the burden upon the defendant to show the reason for the delay. This argument is without merit. The magistrate judge stated that the record is bare as to the reasons for the dismissal. The magistrate judge found that the government gave no explanation for the delay and defendant offered no evidence to support his allegation that the delay was intentional and designed to give the government a tactical advantage. As the magistrate judge correctly found, "[t]here is simply nothing before the Court upon which any kind of informed decision can be made to this factor." (Recommendation, p.7).

Defendant, for the first time in his objections, argues that Count II of the indictment arises from the same "criminal episode" as Count I and should be dismissed for the same reasons as Count I. This separate argument was not addressed by the magistrate judge and the Court need not address the argument because the Court finds that the earlier complaint should be held dismissed without prejudice. Weighing all the factors listed in 18 U.S.C. §3162(a)(2) the Court agrees with the

finding of the magistrate judge that the prosecution in this case should not be terminated by dismissal with prejudice. Accordingly, the defendant's motion will be denied.

2. MOTION TO SUPPRESS TANGIBLE OBJECTS.

In his objections defendant argues that the telephone conversations between Moris Chalah and "Derrick" "did not include a commitment by Derrick to the purchase of cocaine." However, the defendant does not object to the magistrate judge's conclusions that the recordings of the telephone calls were lawfully made and are admissible. Accordingly, after careful consideration, this Court will accept the magistrate judge's recommendation concerning the admissibility of the recordings without further discussion.

Defendant does object to the magistrate judge's finding that the search of his car was lawful. The cases cited by defendant are not applicable to the instant situation. The Court agrees with the magistrate judge that, pursuant to 21 U.S.C. §881(1)(4), the vehicle was subject to seizure and forfeiture because it was used and intended to be used to transport and to facilitate the transport of controlled substances.

Accordingly, the items seized from the automobile are admissible in evidence. The Court will deny defendant's motion to suppress tangible evidence.

The defendant has not made any objections to the magistrate judge's recommendation that the motion to suppress statements be denied as moot and the motions to quash indictment be denied. Therefore, after careful consideration, the Court will adopt the recommendation of the magistrate judge and deny as moot the motion to suppress statements and deny the motions to quash indictment.

For the foregoing reasons,

IT IS HEREBY ORDERED that the report and recommendation of the United States Magistrate Judge is accepted and adopted.

IT IS FURTHER ORDERED that defendant's motions to dismiss indictment for failure to comply with Speedy Trial Act; to quash indictment; and to suppress tangible evidence are denied.

IT IS FURTHER ORDERED that defendant's motion to suppress statements is denied as moot.

s/Donald J. Stohr
UNITED STATES MAGISTRATE JUDGE

Dated: 2/16/92

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2451EMSL

United States of America,	*
	*
Appellee,	*
	* Appeal from the
vs.	* United States
	* District Court for
Derrick Miller,	* the Eastern Dist.
	* of Missouri
Appellant.	*

The petition for rehearing by the panel is denied.

April 29, 1994

Order Entered at the Direction of the Court:

s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

Title 18 U.S.C. §3161.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

APPENDIX G

Title 18 U.S.C. §3162.

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense, the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.